United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1197

To be argued by
THOMAS A. ANDREWS
JOHN J. GRIMES

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

NORMAN RUBINSON, EDGAR REYNOLDS, WILLIAM CHESTER, LAWRENCE LEVINE,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT NORMAN RUBINSON

SHEA GOULD CLIMENKO KRAMER & CASEY
Attorneys for Defendant-Appellant Norman Rubinson
330 Madison Avenue
New York, New York 10017
(212) 661-3200

THOMAS A. ANDREWS, ESQ.
JOHN J. GRIMES, ESQ.
Of Counsel

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UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

Docket No. 75-1197

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

-against-

NORMAN RUBINSON, et al.,

Defendants-Appellants.

BRIEF FOR DEFENDANT-APPELLANT
NORMAN RUBINSON

Preliminary Statement

Norman Rubinson and nine others were charged, in a twenty count indictment filed June 4, 1974, with conspiracy to violate various substantive provisions of the mail fraud, wire fraud and securities laws with respect to the spin-off, manipulation and sale of the common stock of Stern-Haskell, Inc. Two defendants,

Sideny Stein and Philip Kaye, entered guilty pleas prior to the trial and cooperated with the Government. The remaining defendants--eight in number--pleaded not guilty and were tried jointly before a jury-- Honorable Constance Baker Motley presiding.

After a nine-week trial Rubinson was convicted of two counts of the indictment--count one (conspiracy) and count fourteen (interstate transportation of securities when no registration statement was in effect)--and acquitted of seventeen other counts (1964a)*. The following co-defendants were convicted of other counts: Levine--count one; Feiffer--counts one, two and fourteen; and Chester and Reynolds--count fourteen. Haskell, Wax and Gardner were acquitted of all counts.

The Government was represented by Assistant United States Attorneys Frank Wohl, JoAnn Harris and John Gross, assisted by Daniel Schatz of the Securities and Exchange Commission. All defendants were represented by counsel with the exception of Norman Rubinson and William K. Chester who, having been denied Court appointed counsel, appeared pro se.

On May 15, 1975, judgment of conviction was entered herein against Norman Rubinson. He was thereafter sentenced to three years on each of the two counts--the sentences to run concurrently (1964a). Mr. Rubinson has been release on bail

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* All references marked "a" relate to appendix page numbers.

pending hearing and determination of the within appeal.

Mr. Rubinson now appeals from said judgment of conviction.

Issues Presented For Review

1. Was it reversible error for the Court to refuse to assign counsel to Appellant Rubinson?

2. Was it reversible error to deny Appellant Rubinson the opportunity to cross-examine certain witnesses with respect to alleged prior similar acts referred to by the Government in its Bill of Particulars.

3. Was it reversible error to deny motions for a mistrial in the following instances:

a. When Government witness, Saul Weitzman, made a gratuitous comment, in the presence of the jury, to the effect that Appellant Rubinson was a convicted perjurer and had spent time in jail;

b. When the Government went into various alleged dealings in Switzerland by Appellant Rubinson during direct examination of the witness Weitzman;

c. When the Government made prejudicial references, during rebuttal summation, to documents not admitted into evidence and statements to the effect that certain co-defendants were involved in many similar frauds and manipulations,

with Sidney Stein, of stocks of companies closely associated with Appellant Rubinson?

4. Was it reversible error for the trial court to impose the following restrictions on pro se defendants and defense counsel during trial:

a. blanket two hour time limitation on cross-examination of each witness; and

b. blanket half hour limitation on recross-examination of each witness, and subsequently limiting same to fifteen minutes; and

c. a two hour time limitation on summation; and

d. prohibiting recross-examination on certain subject matter even though the particular subject matter was introduced during direct examination and inquired into again by the Government on redirect examination.

5. Did the court commit reversible error in:

a. on the question of criminal intent, declining to instruct the jury with respect to the existence of exceptions to the registration requirements of the Federal Securities Laws, and specifically, to the so-called "no-sale" exemption [15 U.S.C. §77d];

b. declining to adopt appellants' request to charge with respect to the existence of multiple

conspiracies as opposed to a single conspiracy;

c. declining to adopt appellants' request to charge with respect to the statute of limitations;

d. declining to give the instruction requested by all parties, including the Government, regarding certain remarks made by the Government on rebuttal summation.

6. Should the indictment have been dismissed on the following grounds:

a. unnecessary and prejudicial pre-indictment delay;

b. parallel pre-indictment civil proceeding calculated by the Government to gain tactical advantage;

c. unauthorized and unlawful extension of the Grand Jury which returned the indictment; and

d. improper venue?

7. Assuming, arguendo, that the spin-off of Stern-Haskell as outlined in the indictment and described at trial violated the registration requirements of the Securities Act of 1933 (15 U.S.C. §77e et seq.), did appellant have requisite criminal intent to warrant conviction of said violation?

Statement Of The Case

The Indictment

Norman Rubinson was charged in a twenty count indictment with conspiracy (Count One, 18 U.S.C. §371); violation of various substantive provisions of the Federal securities laws with respect to fraudulent transactions (Counts Two-Six, 15 U.S.C. §§77q and 77x); violations of various substantive provisions of the Federal securities laws with respect to stock manipulation and fraudulent devices to defraud the public (Counts Seven and Eight, 15 U.S.C. §§78j and 78ff, 17 C.F.R. §240.10b-5); mail fraud (Counts Nine-Thirteen, 18 U.S.C. § 1341); violation of various substantive provisions of the Federal securities laws with respect to registration requirements (Counts Fourteen-Eighteen, 15 U.S.C. §§77e and 77x); and finally, wire fraud (Counts Nineteen and Twenty, 18 U.S.C. §1343)*.

In essence Mr. Rubinson and 24 other co-conspirators named in the indictment and bill of particulars were charged with having created a public market for some 200,000 shares of the common stock of Stern-Haskell, Inc., a New York corporation engaged in the sale of used cars, at a time when no registration statement as to said securities was in effect with the United States Securities

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* One wire fraud count, Count 20, was dismissed by the Court as against Mr. Rubinson and not submitted to the jury. (1288a)

and Exchange Commission. The indictment alleges that Mr. Rubinson and the co-conspirators employed false and fraudulent pretenses and representations to effect the distribution and sale of these shares to the public. It was charged that this activity was knowingly and wilfully performed in violation of the Federal Securities Laws.

There are few specific factual assertions in the indictment save the usual perfunctory listing of overt acts and the dates of certain mailing together with names and addresses of addressees and a brief description of the matter mailed in each of the mail fraud counts. In all other respects the indictment simply tracks and parrots the language of the various statutes alleged to have been violated.

Pre-Trial Proceedings

Defendant Rubinson was arraigned on June 17, 1974 before Honorable Whitman Knapp, U.S.D.J. (35a). At the arraignment the case was assigned to Honorable Constance Baker Motley, U.S.D.J., for trial. A pre-trial conference at which Mr. Rubinson appeared was held by Judge Motley on June 27, 1974 and the Court fixed September 1, 1974 for the filing of all motions in the case and January 14, 1975 as the date upon which trial was to commence.

Mr. Rubinson was not represented by counsel at either the arraignment or the pre-trial conference. On

August 5, 1974 Mr. Rubinson surrendered for incarceration in Federal prison as the result of a sentence imposed upon him after conviction in another case, and remained incarcerated until November, 1974 when he was released to a Federal halfway-house in Miami, Florida. Mr. Rubinson filed no written motions in the instant case. On December 5, 1975, the date fixed by the Court for oral argument and decision on pre-trial motions, Mr. Rubinson appeared before the Court and made certain motions orally.

Further proceedings were held on December 20, 1974 for the purpose of ruling on defendant Rubinson's application for assigned counsel, and on January 10, 1975 for oral argument and decision on the motion by co-defendants Wax and Levine to dismiss the indictment upon the ground that the Grand Jury was improperly impanelled. Both applications were denied, and the latter application was before this Court on application for Writs of Prohibition and Mandamus, which application was denied, Wax v. Motley, 510 F.2d 318 (2nd Cir. 1975). This Court however stayed the trial of the indictment for a period of one week while it considered said application. The trial was thereafter commenced on January 22, 1975.

The Evidence

The evidence established, and it was virtually uncontested, that co-defendant William K. Chester acquired

control of a public corporation registered under the Florida securities laws known as National Ventures, Inc.* (T.2555, 2556) during the fall of 1968. Thereafter efforts were made by Chester to negotiate the purchase by National Ventures of blocks of stock of various closely held corporations. The plan was essentially to distribute the stock thus acquired to the shareholders of National Ventures as a liquidating dividend (T. 2559) on the theory that those shareholders would then be free to trade this dividend stock in the over-the-counter market. Efforts were made in connection with such transactions to promote interest in these stocks among traders who would then make markets in the newly public securities. The practice above-described became colloquially known in the late 1960's as "Going Public Through the Back Door" (T. 127, 128, 133, 134, Government Exhibit 121C**). In practice, registration statements with respect to these spun-off shares were not filed with the Securities and Exchange Commission, there having evolved an apparently widespread belief that the practice was exempt from the registration provisions of the securities laws (1921a). Indeed, in 1969 the practice seems to have proliferated and according to Ingrid Nelson, an expert from the Securities and Exchange

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* The corporation was originally named Toy King. Its name was later changed to National Ventures (T. 2558)

** Citations of Government Exhibits will be hereinafter marked G.X.

Commission (hereinafter the "SEC") called as a witness by the Government, there were during that year "many, many, many spin-offs" (1287a) done in this fashion. Ms. Nelson, apparently cognizant in 1969 that these spin-offs were being accomplished without the filing of a registration statement, testified that after noticing dozens of such stocks being traded she notified her superiors in the SEC that this "may possible [sic] be a §5 violation and that they should look into the matter whether [sic] this is or is not an exemption"(1287a) (Emphasis added).

On July 2, 1969 the SEC issued a release which addressed itself to the subject of spin-offs of the kind here under discussion (1921a). The release indicated that the acquiring company (in the instant case National Ventures, Inc.) "may be an underwriter within the meaning of * * * the Act" (Emphasis added), and therefore would be"* * *subject to the registration requirements * * * ." Significantly this release, which is somewhat less than definitive, was published several months after the National Ventures spin-off of Stern-Haskell stock to its shareholders was accomplished and public trading of Stern-Haskell had begun on April 14, 1969 (G.X. 670).

The Alleged Conspiracy

A. The Florida Phase

The spin-off aspect of the alleged conspiracy may be termed the "Florida phase" (18a) for National Ventures,

a Florida public corporation, was headquartered in Miami Beach, Florida which was also the home and office location (676a) of its president and guiding force, co-defendant William K. Chester, attorney at law. A company known as Stock Transfer Agency, the name of which explains its function, was also owned at least partially by Mr. Chester (T.577) and was headquartered in Miami. It became transfer agent of Stern-Haskell, Inc. after the spin-off was accomplished. One Sten Nordin, unindicted co-conspirator and key Government witness, was manager and owner of record of the agency during the period relevant to this case (T. 277).

All of the prior similar act evidence introduced by the Government during trial related to other Florida companies. Much trial time was spent in developing the facts surrounding National Venture's attempts to acquire blocks of the stock of Mobile Home Ventures, Inc. and Diston Industries, both Florida corporations (T.3005, 4656), for projected spin-offs which were to have been accomplished by National Ventures in much the same way as the Stern-Haskell spin-off. At least nine witnesses were flown from Florida, presumably at Government expense, to give testimony relative to these prior similar acts,all of which had occurred exclusively in Florida.*

In early 1969 Mr. Chester was actively searching

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* Ardwin Disner, William Fenton, Louis L. Hochen, Phillips Moore, John Myrtetus, Sten Nordin, Bosh Stack, Nicholas M. Torelli and Saul S. Weitzman

for companies which would be suitable spin-off candidates, and in fact National Ventures had advertised openly for such companies. At some point in early 1969, Mr. Chester met Jerome Haskell, co-defendant and Vice President of Stern-Haskell, Inc., while the latter was in Miami Beach (T.2039). The possibility of spinning-off Stern-Haskell stock through National Ventures was discussed and a more formal meeting was arranged to develope the prospect.

On February 8, 1969 this meeting, attended by Chester, Haskell, appellant Rubinson, co-defendants Feiffer and Stein, and unindicted co-conspirators Silber, Weitzman and Hochen took place at the offices of Weitzman in Miami (565a,566a), and an agreement was reached whereunder National Ventures would purchase some 200,000 shares of Stern-Haskell common stock for $5,000.00. It was planned that the shares so purchased would be immediately distributed in toto to the National Ventures shareholders as a liquidating dividend (T. 2054-2057).

National Ventures had a relatively small number of shares outstanding at the time Chester took control. At the above-mentioned February 8th meeting it was agreed that 37,500 new shares of National Ventures would be issued each to Mr. Hochen, Mr. Feiffer and Mr. Weitzman for which these individuals would pay $375.00 each to the corporation (T. 2579-2581). These men would then of course, by virtue of this

stock ownership, receive a substantial number of the Stern-Haskell shares to be spun-off by National Ventures. Hochen denied that he was to be a nominee owner of these shares for Sidney Stein (640a, T. 2803, T. 2815), Weitzman admitted it but said he was told by Hochen that it was all right to be a nominee, and Feiffer did not testify. What is clear out of all this is that Stein used these men to take the Stern-Haskell shares down for him in Florida (639a, 640a, T. 2803) and orchestrated the entire Florida transaction for his own purposes.

B. The New York Phase

The plan thus outlined for accomplishing the spin-off was carried out in due course, and the stock of Stern-Haskell was effectively distributed to the National Ventures shareholders, including Stein's nominees, thereby completing the violation of the registration requirements of the Securities Act of 1933 if in fact a violation there was.

Stein, having under his control a large block of the newly public shares, then set out in New York upon his business of creating a market in which the stock could be traded. He had arranged, according to his testimony, through Rubinson and Feiffer to have the transfer agent issue the stock under his control in the street name of Lockwood & Co., an over-the-counter trading firm in New York City. Stein, who was unquestionably in charge of the "group" (525a-

530a, 640a, T.2803), testified that Rubinson and Feiffer had become friendly with one Ben Malmeth, owner of Lockwood & Co. (1106a, 1107a, 1120a). They had asked Malmeth to endorse the certificates for them as an accommodation (750a-760a), and this he did (for a small consideration), unbeknownst to defendant Lawrence Levine (760a) who was head trader at Lockwood & Co. (1092a).

Meanwhile Stein approached defendant Michael Gardner, owner of Gardner Securities, another over-the-counter trading firm in New York, and solicited Gardner to start the Stern-Haskell market (738a). This Gardner agreed to do. He filed a listing in the pink sheets [National Quotations Bureau] (741a), and on April 14, 1969 began placing bid and asked quotations in the pink sheets (G.X. 670). Stein arranged for Gardner to purchase, so that he would have a "vested interest" in the performance of the stock, 50,000 investment shares of Stern-Haskell directly from the issuer at ten cents per share (739a, 818a), or $5,000.00. These shares were to have been legended as investment stock but were issued by the transfer agent without the appropriate legend. The shares were eventually pledged by Gardner as collateral for a $50,000.00 loan made to him by a Canadian bank which, after defalcation on the loan, found that the shares were not tradable as allegedly warranted by Garnder and therefore of no practical value as collateral. This

loan transaction gave rise to counts 19 and 20 of the indictment.

Stein apparently became dissatisfied with Gardner's performance as a market maker (741a). It was then that he allegedly approached defendants Lawrence Levine and Walter Wax offering to pay them if they would agree to make a market in the stock and generate buying activity (752a, 753a). They allegedly accepted his proposition and Stein, allegedly at Levine's direction, placed his stock in accounts which he cause to be opened at three major brokerage firms (750a). On April 24, 1969, 5 business days after Gardner had first entered a Stern-Haskell quote in the pink sheets, Lockwood & Co. began making a market in the stock by submitting bid and asked quotations to the National Quotations Bureau (G.X. 670). The stock traded in approximately the $3 to $4-1/2 range (G.X. 670) during the period of time between April 14, 1969 when Gardner made the first bid until about July, 1969 when the SEC announced that it was making an investigation of the stock. During this period Stein managed to sell into the market, for a total of approximately $190,000.00 (T. 3528), almost all of his block. Lockwood & Co. became the major market maker in the stock handling both sides of about 90% of the trades and Walter Wax's customers accounted for some 25% of the buying (G.X. 670).

According to Stein, whose testimony was partially corroborated by a co-defendant and cooperating Government witness Philip Kaye, he made payments to defendants Wax

and Levine in unspecified amounts of perhaps "five or ten or fifteen or twenty thousand dollars" (770a), at unspecified times during the period of trading ["April, May, June, July"] (775a), totalling approximately $50,000.00. Kaye was allegedly used as a courrier for at least one payment.

Thus it becomes clear that the "Florida Phase" of the overall alleged conspiracy commenced sometime in 1968, transpired completely within the State of Florida, and terminated with the spin-off of Stern-Haskell to National Ventures shareholders in about February, 1969. The "New York Phase" began in New York City on April 14, 1969 with the first market in Stern-Haskell. The first phase involved essentially Chester, Reynolds, Haskell, Hochen, Weitzman, Nordin for its completion and the second phase essentially Gardner, Levine, Wax and Kaye. Stein, and to a lesser extent Rubinson and Feiffer, are alleged to have been active in both phases.

POINT I

DEFENDANT APPELLANT RUBINSON WAS DENIED DUE PROCESS OF LAW WHEN THE COURT ERRONEOUSLY RULED THAT HE WAS NOT ENTITLED TO APPOINTMENT OF COUNSEL IN THIS COMPLEX CRIMINAL SECURITIES FRAUD TRIAL

A. Defendant Rubinson Was Entitled To Adequate Legal Representation In This Complex Securities Fraud Prosecution

It is deeply rooted in Anglo-American jurisprudence and our concepts of due process of law that a defendant, in a criminal prosecution "shall enjoy the right * * * to have the Assistance of Counsel for his defence." United States Constitution, Sixth Amendment; Johnson v. Zerbst, 304 U. S. 458, 462 (1938). Defendant Norman Rubinson was denied that right. The Supreme Court in Johnson held that under the Sixth Amendment the federal courts, in any criminal action, lack "the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel" (at p. 463). Noting the pitfalls involved when a defendant appears pro se, the Court further observed (p. 462),

> "It [the Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained laymay may appear intricate, complex and mysterious." (Emphasis added.)

The mandate of Johnson was later incorporated into the Federal Rules of Criminal Procedure, Rule 44;

> "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment."

In a recent Supreme Court decision, Argersinger v. Hamlin, 407 U. S. 25 (1972), which dealt specifically with the right of indigent defendants in a criminal trial to the assistance of counsel, it was similarly held (p. 37):

> "[t]hat absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

Justice Powell in a concurring opinion recognized the problems involved when a defendant is forced to trial without the benefit of counsel (p. 46);

> "An unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant. If there is no accompanying right to counsel, the right to trial by jury becomes meaningless."

So important is the right to counsel that the Criminal Justice Act of 1964, 18 U.S. C. §3006A(b), specifically provides for the appointment of counsel for those defendants who are unable to pay for legal representation:

> "* * * Unless the defendant waives representation by counsel, the United States Magistrate or the Court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him." (Emphasis added.)

Defendant Rubinson on December 5, 1974, some six weeks before the trial, made the following request for the appointment of counsel:

> MR. RUBINSON: Your Honor, when I was here the last time, I explained that I was going to be incarcerated in England Air Force Base in Florida, and I am still at a halfway house in Miami, Florida and at that time I didn't have anybody representing me.
>
> I want to petition the Court now for the Court to appoint a lawyer to represent me. I have to spend three more months at the halfway house in Florida (55a).

The Court, after questioning Rubinson about his financial condition (55a-58a), granted the application, appointed an attorney (one Mr. Greenberg) to represent him, and directed Mr. Greenberg to have Rubinson fill out an affidavit of indigency (61a).* Mr. Greenberg however, citing the projected length of the trial, requested to be relieved of the assignment (62a). The Court excused him and appointed another attorney, one Louis Steel, again directing

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* It is noteworthy that the Court at this time advised Rubinson that if it be later determined that he did have adequate funds to pay counsel, he would be required to pay for the legal representation.

Rubinson to fill out an affidavit of indigency and once more indicating that Rubinson had an obligation to pay for counsel should he be found to have sufficient funds (63a).

At this point, only after Mr. Steel's appointment, did the Court mention for the first time that Rubinson should have applied earlier for appointment of counsel (64a-67a). Mr. Steel, discovering that the projected length of the trial was six to seven weeks, indicated that he could not work it into his schedule (71a-74a). The Court, excusing Mr. Steel (74a), again indicated that Rubinson should have made his request prior to December 5, 1974. The Court then pointed out that at some time Mr. Rubinson must have been advised to get counsel (74a). To clarify this point the transcript of a pre-trial conference which had taken place on June 27, 1974 was ordered and the proceedings were suspended with respect to appointment of counsel until the following day when it would be available.

When the record of the June 27th conference was read it indeed revealed the following colloquy regarding Mr. Rubinson's representation by counsel (43a-53a):

> MR. RUBINSON: Your Honor, I don't have an attorney and I am going to be incarcerated on August 5th for six months. I wanted to handle this particular case myself for certain reasons. (45a).

* * * * *

MR. RUBINSON: Well, I'm not going to be here. I am going to be incarcerated. That is what I was going to be asking you, whether it would be possible, being I'm doing my own defense in this case, for reasons that my attorney can't be reached because he is in Europe. He didn't come to my arraignment and to this hearing.

THE COURT: You have an attorney?

MR. RUBINSON: I did have one but we can't find him now because the Government tried to reach him and they called me at my home and called me to appear myself because they couldn't get my attorney.

THE COURT: How long will he be in Europe?

MR. RUBINSON: I have no idea. I don't want to use him in any event because I am more familiar with this case than anybody is. I think I have a very good defense. I would like my sentence stayed until the outcome of this case. I have a six-month sentence, and this will give me time to prepare myself (48a, 49a).

* * * * *

MR. RUBINSON: Your Honor, may I ask you to direct the U. S. Attorney, if I'm incarcerated, to come visit me so we can discuss any motions that may have to be discussed?

THE COURT: I don't know what is funny.

MR. WOHL: The Government would submit, your Honor, if Mr. Rubinson wants to initiate any discussions of that sort, he can do so through correspondence.

MR. RUBINSON: I don't think so, Your Honor, because I would like to argue this myself. There are tapes, I know there are tapes. They have been admitted in Court.

THE COURT: What is your name, sir?

MR. RUBINSON: My name is Rubinson.

THE COURT: You have a right to represent yourself, but I strongly urge you to get a lawyer. It seems to me like a very complicated case,

> and if you haven't had any legal training or experience, you are going to be in great difficulty.
>
> MR. RUBINSON: I understand that, your Honor, because there are Security and Exchange Commission's --
>
> THE COURT: And I cannot act as your counsel.
>
> MR. RUBINSON: Like I say, I'm going to be incarcerated and I'm sure you can direct him whereever I am going to be so we can take it up in an intelligent manner.
>
> THE COURT: I don't have any authority to do that, I don't believe.
>
> MR. WOHL: So the record is clear on this point, I think I should reflect the fact that through the grand jury investigation of this matter, Mr. Rubinson has been represented by Mr. Frank Freeman, an attorney in Miami, Florida who has appeared in my office on at least two occasions on behalf of Mr. Rubinson; has also made numerous phone calls on behalf of Mr. Rubinson, and has represented to me that he expects to represent Mr. Rubinson in this particular matter. But I just wanted to make it clear that we are not dealing here with a defendant who has never had any counsel in this matter (51a, 52a).

After reviewing this colloquy, the Court determined that Mr. Rubinson had failed to make timely application for appointment of counsel [by September 1, 1974 - the date fixed for motions in the case] (83a, 84a), and that, by virtue of the statements above set forth, Rubinson apparently had effectively waived his right to counsel at the June 27, 1974 conference (90a). The Court below in effect reversed its earlier decision in which it had granted Mr. Rubinson's December 5, 1974 appplcation for assigned counsel. Parenthetically, The Court is respectfully advised

that on September 1, 1974 Mr. Rubinson was incarcerated in Federal Prison as he had been since August 5, 1974 (45a, 85a).

It is respectfully submitted, and the record clearly supports this contention, that the Court's refusal to appoint counsel for Rubinson was based solely upon the reluctance of the two assigned counsel and relieved one after the other by the Court, to become involved in a lengthy criminal securities fraud trial. The record disclosed and we respectfully state that the Court was less interested in finding a competent attorney willing to represent Rubinson and thus protecting his Constitutional right than it was in moving the proceedings along with dispatch.

Sometime after the denial of Rubinson's request for the appointment of counsel, a hearing was noticed to be held on December 20, 1974 to determine Rubinson's financial ability. The record is not clear as to how this hearing came to pass or who was responsible for causing it, however it does indicate we respectfully submit that the motive and purpose was not to conduct a review of the Court's December 6th ruling denying appointment of counsel, but rather to conduct a perfunctory, one-sided inquiry calculated solely to bolster and fortify the hasty and, we respectfully say, erroneous denial of Rubinson's application. The record discloses that the Government was represented by two attorneys and Rubinson stood alone (108a); the Court opened the proceeding with the words,

obviously addressed to the Government, "Do you have any information as to Mr. Rubinson's financial ability to put on the record?"(Emphasis added) (109a); the Government was permitted to place the following vague, unsworn assertions on the record through the Assistant United States Attorney who was not subjected to cross-examination:

a) Rubinson occupies a "large and attractive house on Hibiscus Island in Florida"(110a);

b) the Government "understands" Rubinson "drives" a Rolls Royce automobile and that he and his son "share" driving either a Maserti or Lamborghini (111a);

c) the Government "understands" he had "substantial corporate interests" and "jewelry" and was purportedly wearing an "expensive wristwatch" (111a, 112a);

d) his telephone was answered by someone who "sounded very much like a domestic" (112a) [whatever a "domestic" sounds like].

A careful review of this record shows beyond question that there is not one single shred of evidence that Rubinson owns anything which would indicate wealth as the Government led the Court below to believe. How could a good faith determination with respect to indigency be made from this record? It is shocking, mind boggling, that a defendant pro se, presumed innocent under the law and petitioning a Federal Court for the assistance of counsel in making his defense, could

receive this kind of treatment. The only evidence in the record regarding Rubinson's financial status in December, 1974 is Rubinson's own sworn, unimpeached testimony to the effect that his wife and daughter own the family home in which he lives (123a) [a matter of public record]; that the house is heavily mortgaged and not marketable (125a); that he received no income during the past 12 months (115a), and he had been incarcerated during this period (117a); he had lived on loans from his son and mother-in-law who had lived with him and his wife for 30 years (116a, 117a), had worked for over 50 years and was very frugal (122a); he owned some securities with a maximum value of $2,000,00 which probably could not be sold (120a); and that the prosecutor was not asking him, Rubinson, about any of the above-referred to vague statements he, the prosecutor, had earlier made to the Court (118a). The Court is advised that after verdict in this case the Government again had Rubinson on the stand regarding his finances in connection with bail pending appeal (2014a-2029a), and the effect was the same--the evidence showed Mr. Rubinson to have been virtually without assets and living solely on the limited resources of his family.

In its opinion on post-trial motions the Court indicated that Rubinson's answers during the December 20, 1974 hearing "were pointedly evasive and impeded the Court's development of this issue" (2036a). It is submitted that Rubinson, without a lawyer to protect him, nevertheless answered all

questions forthrightly and obeyed the Court's instruction to give definite answers (115a). With all due respect, if anything in this record is vague, unreliable, evasive and misleading it is the above-referred to comments made by the Government. The record reveals only two points at which Rubinson perhaps could have, in the first instance, been more definite (114a-115a and 117a). Regarding the first, he cleared up any confusion in his answers once the Court called his attention to it (115a), and in the other instance, the Court itself cleared up the problem (117a). Even if, arguendo, Rubinson's answers impeded development of the issue, either the two experienced Government attorneys or the Court could and should have clarified the problem at that time.

At the conclusion of the hearing the Court -- according to its post-trial opinion which notes that Rubinson was employed in the travel business and states that he had "considerable equity" in his wife's house -- ruled that Rubinson "is capable of employing his own counsel" (126a). It is noteworthy however that the value of his wife's house was never determined at the hearing, the Court having fixed the figure of $80,000.00 as its value without indicating on the record the reasons therefor (125a).* The only indication of value, however, was that its initial cost was approxi-

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* At a post-trial hearing on May 15, 1975 the Court indicated that Rubinson should have furnished an appraisal of the house (T.19) along with pictures and a description (T.29-30).

mately $17,000 and that it now has a $40,000 mortgage. (125a). Another interesting point is that Rubinson's employment at a travel agency was never brought up during the hearing. Furthermore, there is nothing in the record indicating the salary, if any, that Rubinson was paid for his work at this travel agency.

B. The Court Erred In Not Following The Proper Procedure In Determining Rubinson's Eligibility For The Appointment Of Counsel

The procedures followed leading to denial of Rubinson's request for counsel must be closely scrutinized. Although Rubinson originally indicated at arraignment that he had counsel he made it clear afterwards that he was not represented by counsel (43a). The Court at that time should have but failed to advise him that he was entitled to court appointed counsel if he could not afford to retain an attorney. Rule 44 F.R. Criminal P. The Court acknowledged this basic requirement by commenting in December (74a):

> "It seems to me that both defendants must have been advised at some point that they would have to get counsel, and if they could not afford an attorney the Court would appoint one for them . . . "

In fact, Rubinson was never so informed.

This constitutional mandate has been the topic of various commissions in recent years. The National Advisory Commission on Criminal Justice Standards and Goals ("National

Advisory Commission") in its report entitled Courts, set forth the following standard to be applied when public representation of a defendant is to be considered, (Standard 13.1, p. 253):

> "Public representation should be made available to eligible defendants in all criminal cases at their request . . .
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> * * *
>
> Defendants should be discouraged from conducting their own defense in criminal prosecutions. No defendant should be permitted to defend himself if there is a basis for believing that:
>
> 1. The defendant will not be able to deal effectively with the legal or factual issues likely to be raised;
>
> 2. The defendant's self-representation is likely to impede the reasonably expeditious processing of the case; or
>
> 3. The defendant's conduct is likely to be disruptive of the trial process."

See also the "American Bar Association's Minimum Standards for Criminal Justice" ("ABA Standards"), Providing Defense Services, p. 59 §7.1 ("Defense Services"). Rubinson was not discouraged from conducting his own defense but rather, on the contrary, was forced to enter the trial arena without the benefit of counsel.

Once Rubinson made known his desire to have Court appointed counsel the Court had the obligation to make a thorough determination of his eligibility for such assistance. Wood v. United States, 387 F. 2d 353, (5th Cir., 1967)-on

remand from Wood v. United States, 389 U.S. 20 (1967)- Cert. denied 396 U.S. 924, (1969); United States v. Cohen, 419 F. 2d 1124 (8th Cir., 1969). Two brief inquiries into Rubinson's financial status were made prior to trial.* In addition to these inquiries, the Government attempted to submit affidavits after the trial to support its position that Rubinson was financially able to employ counsel. A thorough review of the record nevertheless lends absolutely no support to the Court's finding.**

Although the Court indicated that Rubinson should have furnished an appraisal, pictures and description of the Florida home, owned as aforesaid by his wife, no attempt was made by the Government or the Court to request production of such proof nor did the Government attempt to gather such evidence and present it. One cannot expect a layman with no legal experience to anticipate such things, expecially since he didn't even own the house.

The Court and the government had ample opportunity

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*Although the opinion cites the trial transcript (T. 7439, et seq.) with respect to inquiries into the financial status of Rubinson, a review of these pages reveals very little: after the jury returned the verdict, Rubinson was asked about his passport (T. 7454), if he had a job at the present time (T. 7457), and if his wife was employed (T. 7458).

**The opinion lists January 10, 1975 as one of the dates the court held a hearing to determine defendant's eligibility for appointment of counsel. A review of the transcript of the proceedings of that day fails to reveal such hearing. Defendants Rubinson and Chester were not even present.

to make a thorough inquiry into the assets and liabilities of Rubinson but failed to adduce any evidence that Rubinson was able to afford counsel. Professor Steven Duke of Yale Law School discussed this very point in an article "Argersinger And Beyond", 12 American Criminal Law Review 601, 628 (1975):

> "A criterion of indigency which focuses merely on the defendant's access to assets or his income is inadequate. Rather, the test should be whether the cost of the defense, considering all aspects of defendant's financial condition, would impose a substantial hardship on the accused or his family. A sum of money which is a "substantial hardship" will vary geographically and with the prevailing costs and standards of living, since the objective is to prevent an accused from foregoing a contest for none other than economic reasons.
>
> * * *
>
> Since indigency is both relative and fincaional, a decision is incoherent if it does not take into account the probable cost of counsel. This will, of course, differ from jurisdiction to jurisdiction and will vary with the charge. In determining eligibility, however, the judge should estimate the probable cost of retaining counsel for a TRIAL of the offense. To hold that an accused can afford the AVERAGE cost of representation for a particular offense is simply to decide he can afford a lawyer to plead him guilty. This is an impermissible prejudgment of the merits and a preclusion of the very choice the right to counsel seeks to preserve.
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> * * *
>
> In assessing financial hardship, the inquiry should include an inventory of assets, liabilities, and current costs of living. If an accused personally has NET assets which considerably exceed the estimated costs of his defense, the preliminary influence would be against a finding of financial inability. If,

> however, it appears that he is unemployed and virtually unemployable; if, for example, he has no skills or is aged or infirm, the inference should vanish. Under such circumstances, if his net assets are insufficient to support him and his family for the indefinite future, he is functionally indigent." (Emphasis added.)

None of the guidelines to determine the necessity of appointing counsel as set forth in Argersinger v. Hamlin, supra were used by the Court. Mr. Justice Powell suggested that determination of the right be made on a case by case basis taking into account the following (at p. 64):

> "First, the court should consider the complexity of the offense charged.....If the offense were one where most defendants who can afford to do so obtain counsel, there would be a strong indication that the indigent also needs the assistance of counsel.
>
> Second, the court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the possibility that a lawyer should be appointed.
>
> * * *
>
> Third, the court should consider the individual factors peculiar to each case.....One relevant factor would be the competency of the individual defendant to present his own case."

There is no doubt that the charges as outlined in the indictment (13a) are complex and conviction permits severe sentences and/or fines. There is also no dispute that Rubinson is not an attorney nor does he have any legal expertise to adequately present his own case. Rubinson offered evidence regarding his indigency the only way he knew how and no evidence was given to contradict any of his statements

It is noteworthy that every time Rubinson made a statement about his financial condition the government insisted that it be under oath (201la). On the other hand the Court allowed the Government to make numerous amorphous statements in the record without ever having been sworn or cross-examined (110a-112a).

C. Defendant Rubinson Is Indigent And Entitled To Court Appointed Counsel

Indigency, when viewed in the context of right to counsel, is not to be confused with complete destitution. United States v. Cohen, supra; Hardy v. United States, 375 U.S. 277, (1963); and 3 Wright, Federal Practice and Procedure: Criminal,§732 at 211 (1969). In Hardy, the Court said, (289, n. 7):

> "Indigence 'must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means.'... An accused must be deemed indigent when 'at any stage of the proceedings [his] lack of means... substantially inhibits or prevents the proper assertion of a [particular] right or a claim of right.' ...Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer."

Anaya v. Baker, 427 F. 2d 73 (10th Cir., 1970) cited by Judge Motley in the opinion, concedes that the law is not clear with respect to the criteria for indigency. The Court said (p. 75):

> "...the language [of 18 U.S.C. §3006A] must be viewed as a relative concept measured in each case by reference to the particular need under consideration, Thus viewed, we can see that the defendant need not be 'indigent' but instead, when the defendant lacks the financial resources which would allow him to retain a competent criminal lawyer at the particular time he needs one, he is entitled to appointed counsel." (Emphasis added.)

Indigency, therefore, when used in the context of the arguments herein will refer to one who cannot afford to hire an attorney in a particular case.

It is submitted that Judge Motley, in ruling that Rubinson was financially able to retain counsel, mistakingly placed too much emphasis on the premise that Rubinson was not "destitute", although the record shows he was not far from it. The Court did not take into account the myriad other factors involved in a determination of whether or not Rubinson could afford to retain private counsel to represent him in a lengthy and complex criminal trial in New York City involving violations of the securities law, conspiracy and mail fraud.

The evidence supporting Rubinson's claim of being unable to afford competent counsel is overwhelming and uncontradicted. At the time of his request, on December 5, 1974, he was in a halfway house following a brief te m in prison (55a). He indicated that he was in the appliance

business from 1943 to 1969 (56a). Shortly before he went to prison on August 5, 1974 he tried to organize travel charters but stopped (56a) when he entered prison.* In the interval between 1969 and the time when he started attempting to organize charters [a business requiring little or any capital], Rubinson did not have any source of income. This was the low period in an otherwise exemplary life. During this period he admittedly engaged in frivolous drinking and other meretricious activities (pp. 1944a-1945a, 2019a-2020a). Rubinson attempted to enter other business ventures or find employment in the years between 1969 and August, 1974 but each attempt ended in failure (1943a, 1945a). He did mention to the Court, however, that he was not generating any income at the time (56a-57a) and that he did not own any real property (57a). Additionally, he has to pay a $10,000 fine -- the result of a previous conviction -- at the rate of $575 to $600 a month (56a).* During the period of incarceration his office furniture was repossessed (1937a).

It would appear that the Court below incorrectly viewed indigency as being synonymous with destitution, It was to avoid this kind of interpretation that the word indigent was left out of the Criminal Justice Act (18 U.S.C. §3006). The Attorney General's Committee on Poverty and the Administration of Justice, Report on Poverty and The Admin-

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*Judge Motley may have assumed that Rubinson was in the travel business for a number of years, and generating income because she mistakingly announced that the reason for his short period of incarceration must have been to preserve his business so that his "income and livelihood would not be disrupted" (88a).

istration of Federal Justice (1963). The purpose of the draftsman was to preclude "a rigid standard for every defendant without regard to the cost of obtaining legal services for a particular case." See Commentary to ABA Standards -- Defense Services §6.1.

The ABA Standards -- Defense Services, is directly in point with the situation presented in this case (§6.1, p. 53):

> "Counsel should be provided to any person who is financially unable to obtain adequate representation without substantial hardship to himself or his family. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he had posted or is capable of posting bond." (Emphasis added.)

In the commentary to the above Standard reference was made to a survey conducted by the American Bar Foundation (at p. 54):

> "[R]esources of the defendant's parents are usually considered only when he is a minor, and even then some courts recognize that the parents have no legal obligation to provide a lawyer for him. For the most part, resources of the spouse are considered a disqualification only in community-property states and only if the resources are community property." (Emphasis added.)

Moreover, the Court should have explored other factors - such as the possibility of partial payment or

reimbursement-before reaching the conclusion not to appoint counsel. The Criminal Justice Act of 1964 has provisions for reimbursement when a defendant is later found to have funds, 18 U.S.C. §3006A(c), (f). The Sections set forth in part:

> "(c) ...If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d)...
>
> * * *
>
> (f) ...Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney..."

The ABA Standards -- Defense Services, §§6.1, 6.2 and 6.3 specifically address partial eligibility and reimbursement (pp. 55-59):

> "§ 6.2 Partial eligibility.
>
> The ability to pay part of the cost of adequate representation should not preclude eligibility. The provision of counsel may be made on the condition that the funds available for the purpose be contributed to the

system pursuant to an established method of collection.

* * *

§ 6.3 Determination of eligibility.

A preliminary and tentative determination of eligibility should be made as soon as feasible after a person is taken into custody. The formal determination of eligibility should be made by the judge or an officer of the court selected by him. A questionnaire should be used to determine the nature and extent of the financial resources available for obtaining representation. If at any subsequent stage of the proceedings new information concerning eligibility becomes available, eligibility should be redetermined.

* * *

§ 6.4 Reimbursement.

Reimbursement of counsel or the organization or governmental unit providing counsel should not be required, except on the ground of fraud in obtaining the determination of eligibility."

Similarly, The National Advisory Commission in its report, entitled Courts, includes the following standard (Standard 13.2, p. 257):

"An individual provided public representation should be required to pay any portion of the cost of the representation that he is able to pay at the time. Such payment should be no more than an amount that can be paid without causing substantial hardship to the individual or his family. Where any payment would cause substantial hardship to the individual or his family, such representation should be provided without cost.

The test for determining ability to pay should be a flexible one that considers such factors as amount of income, bank account, ownership of a home, a car, or other tangible or intangible property, the number of dependents,

and the cost of subsistence for the defendant and those to whom he owes a legal duty of support. In applying this test, the following criteria and qualifications should govern:

1. Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel or because he has posted, or is capable of posting bond.

2. Whether a private attorney would be interested in representing the defendant in his present economic circumstances should be considered.

3. The fact that an accused on bail has been able to continue employment following his arrest should not be determinative of his ability to employ private counsel.

4. The defendant's own assessment of his financial ability or inability to obtain representation without substantial hardship to himself or his family should be considered." (Emphasis added.)

In Wood v. United States, 389 U. S. 20, 21, supra, the Supreme Court noted that in an inquiry into a defendant's financial ability to retain counsel the trial court should explore the possibility of partial payment as an alternative.

Surely in any analysis of the ability to pay for counsel the cost of counsel must be considered. Legal fees charged by competent attorneys to prepare for and conduct a nine-week criminal securities fraud trial would be enormous. Figures of $35,000 or even $5,000 per week were suggested to the Court below, and without dispute (105a, 1948a). Assuming, arguendo, that the legal fee to represent Rubinson would have been approximately $35,000, there was no showing that he

could afford to pay even a fraction of this sum.

D. Defendant Rubinson Did Not Waive The Right To Counsel

When the Court denied Rubinson's application to have counsel appointed, the sole ground for such denial was that Rubinson previously waived his right to counsel (pp. 90a, 1949a, 2037a).* In denying the application, Judge Motley said (88a):

> "We cannot permit defendants in criminal cases to represent on one hand that they are going to represent themselves, and then come in shortly before trial and say, 'I'd like the Court to appoint a lawyer for me.'"

It is defendant Rubinson's position that the denial of counsel was on this one ground alone and that the alternate finding that he could afford counsel, while in itself erroneous, was only an afterthought to bolster the previous erroneous ruling.

The Threshold question is: did Normal Rubinson intelligently waive the right to counsel? In June, 1974 when Rubinson appeared before Judge Motley, he indicated that he did not have an attorney (45a). He was not advised at that time that he had the right to be represented by

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* At the arraignment before Judge Knapp on June 17, 1974 Rubinson informed the Court that he was represented by counsel (37a). Reynolds was the only defendant who requested assigned counsel at that time (p. 37a).

counsel and that counsel would be appointed if he could not afford one. Rubinson did, however, mention on three occasions during the pre-trial conference, that he did not need the assistance of counsel (pp. 48a, 49a) because he was about to be incarcerated. The only response by the Court with respect to these statements was to the effect that the case is complicated and that the defendant is strongly urged to get a lawyer (p. 51a). Nothing else was said at that time regarding an attorney for Rubinson. The Court then gave all parties until September 1, 1974 to file all motions.*

It is respectfully submitted that the Court should have, but failed to, explain to Rubinson the pitfalls involved when a defendant proceeds pro se. United States v. Plattner, 330 F. 2d 271 (2nd Cir., 1964). Rubinson was not advised of or questioned on the subject of his right to be represented by counsel at the trial. Furthermore, the Court failed to make a thorough determination as to whether Rubinson knowingly and intelligently waived the right to be represented by counsel and for all the Court knew on June 27, 1974, the man named Rubinson standing before it may have been a mental defective or lunatic. Johnson v. Zerbst, 304

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* As far as can be determined, the first time any defendant or attorney appeared before Judge Motley again after June 27, 1974 was December 5, 1974 when Rubinson made his application.

U.S. 458, 464-465, supra; Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1942). The rule in the Second Circuit is clear; in Plattner the Court said (p. 276):

> "...[i]t is incumbent upon the presiding judge, by recorded colloquy with the defendant, to explain to the defendant: that he has the choice between defense by a lawyer and defense pro se; that, if he has no means to retain a lawyer of his choice, the judge will assign a lawyer to defend him, without expense or obligation to him; that he will be given a reasonable time within which to make the choice; that it is advisable to have a lawyer, because of his special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself. If the result is a waiver of the right to counsel and an election to defend pro se, the presiding judge should conduct some sort of inquiry bearing upon the defendant's capacity to make an intelligent choice. In other words, there must be a record sufficient to establish to our satisfaction that the defendant 'knows what he is doing and his choice is made with eyes open.'" (Emphasis added.)

This rule was again reiterated in two recent Second Circuit decisions. In United States v. Duty, 447 F. 2d 449 (2nd Cir., 1971), a case in which the Court found that the defendant did waive the right to be represented by counsel, the Court said (pp. 450, 451):

> "The determination as to whether there has been an intelligent waiver of the right to counsel, as is well recognized, must depend in each case upon the facts and circumstances surrounding the case, including the background, experience and conduct of the accused.
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> * * *
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> ...[a]s a general rule, it is preferable for the court to examine the defendant with specificity and advise against self-representation, emphasizing the risk, pitfalls and complexities inherent in such procedure and the serious consequences of

conviction."

Similarly, in United States v. Harrison, 451 F. 2d 1013 (2nd Cir., 1971), a case wherein an attorney represented himself pro se, this Court in reversing the conviction said (p. 1014):

> "The only way this essential right to counsel can be waived is by giving specific instructions to the accused informing him of his rights and then by having the accused make an intelligent waiver of such rights."

So important is the question of waiver that the Supreme Court has addressed it time and again. Johnson v. Zerbst, supra; Adams v. United States ex rel McCann, supra (at p. 279); Von Moltke v. Gillies, 332 U.S. 708 (1947); Carnley v. Cochran, 369 U.S. 506 (1961); Miranda v. Arizona, 384 U.S. 436, 470-471. In Johnson the Court said (at pp. 465, 468):

> "The constitutional right of an accused to be represented by counsel invokes, as of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.
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> * * *
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> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the

assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court-as the Sixth Amendment requires-by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void..."

The Court in Von Moltke said (at pp. 723, 724):

"We have said: 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." (Emphasis added.)

Similarly in Carnley the Court said (at p. 516):

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

A slightly different formulation may be found in the ABA Standards-The Function of the Trial Judge ("Trial Judge") §6.6 (at p. 84):

> A defendant should be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that he
>
> (i) has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (ii) possesses the intelligence and capacity to appreciate the consequences of this decision; and
>
> (iii) comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case."

Judge Motley relied on two cases in support of the finding that Rubinson intelligently waived his right to counsel (p. 2037a): United States v. Arlen, 252 F. 2d 491 (2nd Cir., 1958) and United States v. Harrison, supra. Arlen is inapposite. Arlen dealt with a defendant who could apparently afford counsel but was attempting to delay the proceedings in order to take advantage of the age of the

government's witness. The Court found that Arlen's delaying tactics amounted to a constructive waiver. For reasons which will be pointed out below, such is not the case here.

It is further submitted that the issue of waiver never arose until after two attorneys, on separate occasions (61a, 63a), were appointed to represent Rubinson but declined after they learned that the trial would be lengthy. This cavalier manner in which the issue of appointed counsel was handled cannot be condoned.

Even if it is found that Rubinson knowingly and intellifently waived counsel on June 27, 1974, the waiver was revoked on December 5, 1974 when he made a timely request for appointment of counsel (55a). The Court, indicating that his request was not timely, pointed out that he did not file a motion by September 1st (83a) and therefore his application came too late. This argument, also, cannot stand. December 5th was the date set for a hearing on all defense motions. Rubinson, a layman who had been incarcerated since August, believed that since Mr. Chester, a lawyer, had filed by September 1, 1974 a motion to have counsel appointed for him (26a), and that since Chester's motion was not decided on September 1, he, Rubinson, could make an oral motion when he next appeared before the Court (88a) on

the hearing date which, in fact, turned out to be December 5, 1974. The date for the filing of motions, was postphoned several times at the request of other attorneys in the case and so Rubinson's motion was not made until December 5 when the hearing on motions was finally held. When Rubinson called this to the Court's attention, the Court brushed the explanation aside saying "Well, that was Mr. Chester's motion. We are on your case right now."* (88a)

The Court erroneously found that Rubinson had previously made an application for assignment of counsel which had been denied (2027a). Rubinson's first application to the Court for assignment of counsel was on December 5 and that was the only application denied by the Court.

The Government may argue that this was a tactic by Rubinson on the eve of trial, to delay the proceedings unnecessarily in order for appointed counsel to thoroughly prepare for the trial. This argument cannot stand for two reasons: (1) Rubinson made the request on his first appearance before Judge Motley after the June 27 conference and, procedurally, he did it the only way he knew how;** and (2) after the December 5th and 6th hearing two defendants substituted counsel without any delay of trial. Mr. Fischetti was substituted for Mr. Thebner to represent defendant

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* The last time any party or counsel appeared before Judge Motley was June 27th (almost six months prior to the December hearing).

** Several defense attorneys were allowed to join in the motions of co-counsel. A courtesy which should have been allowed to Rubinson.

Haskell on January 10, 1975 and Mr. Higgins was substituted for Mr. Berger to represent defendant Gardner on the first day of trial (130a). It is noteworthy that neither attorney asked for an extension of time. Furthermore, both attorneys did a commendable job in representing their respective clients on such short notice. Both Gardner and Haskell were acquitted.

Even though the Court found that Rubinson waived the right to be represented by counsel at his trial, the Court should have appointed a standby counsel to assist him and protect his rights. ABA Standards-Trial Judge, §6.7, p. 87. This Standard recommends the following:

> "When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion. Standby counsel should always be appointed in cases expected to be long or complicated or which there are multiple defendants." (Emphasis added.)

E. Defendant Rubinson Did Not Proceed Pro Se To Gain A Tactical Advantage Or Use Such Status As A Strategy To Gain Favorable Appellate Review

The government alleges (135a) and the Court in its opinion (2038a) and during sentencing (1949a) mentions that Rubinson's choice of proceeding pro se at trial was part of

his "trial strategy." There is absolutely no basis for this allegation. If the Government or Court felt that this was part of a trial and appellate strategy they should have called Rubinson's "bluff" and appointed counsel. The Government, by making such a statement, is doing exactly what it claims Rubinson is doing - laying the groundwork for appellate purposes. If there was, at all, the possibility that Rubinson intended to employ this strategy and disrupt the trial, the Court had a duty to appoint counsel. National Advisory Commission, Courts, Standard 13.1, p. 253, supra.

F. Rubinson Was Prejudiced and Denied Due Process Of Law By The Failure To Assign Counsel To Conduct His Defense

Rubinson, having been forced to proceed pro se, made feeble attempts to handle his defense. Not being a lawyer he fumbled through cross-examination often being repetitive and never very effective. Oftentimes, he either failed or attempted and failed to get evidence admitted. Rubinson's questions on cross-examination were ill-conceived and his summation was less than ideal.* He did not know how or when to object to questions asked or evidence offered by the government. He was not advised as to whether or not he should present a case in his defense. He apparently followed the lead of the majority of defendants and rested upon completion of the Government's case.

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* Rubinson's cross-examination: Nordin (289a-297a); Weitzman (467a-534a); Hocken (578a-602a); Whire (692a-695a); and Stein (824a-948a, 985a-994a, 1064a-1067a). Rubinson's Summation (1432a-1456a).

Although many witnesses testified, in one way or another, about Rubinson, his cross-examination of them was less than adequate. He was frustrated on several occasions because he could not get something out which he thought was important. In his cross-examination of Sten Nordin (290a) he attempted to show that Nordin stole $11,000 from him. He was thwarted in every attempt. He indicated that he needed counsel and sat down in frustration (297a). The Court then, in an explanation to the jury, indicated that Rubinson was "financially able to employ counsel of his own choosing" and that "he is representing himself by choice" (298a). Similarly, during the cross-examination of Sidney Stein, the chief government witness, Rubinson plodded through without any observable purpose or direction (824a). He did, howeber, stumble onto certain points--such as Stein's past criminal activities and Stein's activities concerning B'Noth Jerusalem and $100,000--but was unable to develop them to a point which was beneficial to his defense.*

Lastly, a perfect example of Rubinson's imcompetence was during the direct and cross-examination of Arthur Kravetz (T. 4945). Mr. Kravetz offered some very damaging testimony against Rubinson. Although the defendants were supplied with over 300 pages of 3500 material on Kravetz and he was a very vulnerable witness, Rubinson was unable to skillfully marshall the material to impeach and destroy his credibility.

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* More will be said of Rubinson's cross-examination at Point II, infra.

The testimony of Kravetz related only to Rubinson. Furthermore, Rubinson was prevented from developing other areas on cross-examination (T. 4967), and was prevented from continuing his cross-examination (T. 4969).

In the above instances an experienced trial lawyer could have developed a line of cross-examination that would have been beneficial to Rubinson. This is a danger that courts condemn, Argersinger v. Hamlin, supra, at p. 47; Powell v. Alabama, 287 U.S. 45 (1932), and one of the reasons why, in Powell, the Court stated (at p.69):

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial...of due process in the constitutional sense."

The government may argue that Rubinson's efforts at cross-examination were commendable. A thorough review of the record would refute that argument. Furthermore, it is

noteworthy that it was held that even an attorney familiar with the criminal law was incompetent to represent himself in a criminal prosecution. United States v. Harrison, 451 F. 2d 1013, supra.

The fact that the Court ruled that Rubinson waived the right to counsel even after a timely request was made and after two attorneys had been appointed by the Court, but later declined, and without the Court conducting a thorough examination of Robinson with respect to his alleged waiver, is denial of due process of law and mandates a new trial.

POINT II

APPELLANT WAS DENIED A FAIR TRIAL BY VIRTUE OF THE TESTIMONY OF THE WITNESS WEITZMAN REGARDING APPELLANT'S PRIOR CONVICTION AND IMPRISONMENT, AND THE COURT ERRED IN NOT GRANTING A MISTRIAL

The Government called as a witness one Saul Weitzman, unindicted co-conspirator and allegedly a nominee to whom a number of Stern-Haskell shares were issued (445a). Weitzman, by his own admission, harbored a vendetta (497a) motivated by intense hatred for Rubinson as he considered, for some reason, that Rubinson among others had destroyed his entire economic life and his marriage as well (523a). Rubinson, without counsel, found himself not only conducting his own defense against complex charges, but also facing a clever antagonist who, in the guise of Government witness, seems to have been dedicated to Rubinson's conviction and perhaps the furtherance of his own civil suit seeking substantial damages from Rubinson and others (45a).

Weitzman testified on direct examination, inter alia, that some time during mid-1969 Rubinson inadvertently left certain papers on his (Weitzman's) desk which Weitzman retained and later apparently gave to the authorities in connection with the Stern-Haskell investigation. These papers were offered into evidence by the Government (447a, 448a; Exhibits 61 and 61A, 45A). On cross-examination Mr. Rubinson inquired of Weitzman as follows regarding these papers (495a):

Q. Did you run after me to give it back?
A. No.
Q. Why?

Now the hate, admitted by Weitzman in the abstract, became manifest reality for he selected this moment in time to take his revenge and, twisted as he was by base emotions, lashed out at Rubinson from the stand (496a):

> A. There came a time when I started to accumulate information against you, Mr. Stien and Mr. Feiffer for certain damages and harm that were very extreme to myself, my family, my finances, and my business, to the point where I was being destroyed and I had to start protecting myself, I had to get all the facts so that I could present it to the proper authorities, to clear myself, to not put me into the same category as being a criminal, the same as you and Stien and Feiffer are. (Emphasis added)
> Q. Oh, thank you.
> A. I am not a convicted perjurer like you are.
> Q. Thank you.
> A. Right.

The Court, denying the immediate request for a mistrial by Mr. Fischetti, counsel for co-defendant Haskell, did not reprimand the witness or address the jury, but rather permitted the outrage to go on even though Rubinson tried to stop it (497a):

> THE WITNESS: May I continue?
> Q. No, I want to ask you a question. (Emphasis added) You brought up perjury --
> A. I didn't finish. You asked me a question, I didn't finish.
> I have never been in jail. (Emphasis added)
> Q. You mean I was in jail?
> A. To the best of my knowledge, yes.
> Q. Tell the jury --
> THE COURT: Do you want to pursue that?
> MR. RUBINSON: No, I don't want to pursue it at all. He brought it up. (Emphasis added)
> THE COURT: Let's pass it by. (Emphasis added)
> MR. RUBINSON: He made me, in front of this jury right now, to show his venom, he said I was a convicted perjurer, and that I was in jail.
> I cannot get a fair trial here, and I immediately request a severance on those grounds. (Emphasis added)

Mr. Rubinson, obviously taken aback by the fatal broadside, asked twice for a side bar conference which the Court denied (498a-499a), directing that he proceed to another subject. Rubinson again asked for a lawyer, advised the Court that he was overwhelmed and could not cross-examine the witness anymore (508a). The indifference however to Rubinson's plight simply solidified, and the Court just passed it off with the observation "You could have foreseen that he might say something like that"(509a).

As a matter of fact, we respectfully state that the Court misperceived the issue for Mr. Rubinson could not have foreseen Mr. Weitzman's answers. They were bald faced lies and not responsive in any way to the question which triggered them. This is absolutely so for although Rubinson has in fact been convicted of perjury and stock manipulation, and indeed served a six-month sentence in Federal Prison, the indictment which brought about the conviction was handed down in late 1972 and Mr. Rubinson was not convicted until October, 1973 (501a). He was never before that time indicted or convicted in any jurisdiction. How then could Weitzman justifiably and truthfully say that he saved the papers in mid-1969 because Rubinson was a convicted perjurer and had been to prison; notwithstanding Weitzman's venom how could anyone have anticipated that he would make these statements?

The best statement we have found of the law's philosophy regarding basic fairness in this kind of situation is the following:

> "* * * it is inconsistent with our traditional conception of fair trial to permit the introduction of any evidence which might influence a jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged ."United States v. Harris, 331 F.2d 185, 187 (4th Cir. 1964).

We have found no reported case which went to verdict after the jury heard statements the like of those here presented. The Court below relied, in sustaining this conviction, upon the authority of United States v. Maxwell, 383 F.2d 437 (2d Cir. 1967), Cert. denied, 389 U.S. 1057 (1968),(2059a, 2060a), wherein this Court found it "unfortunate" that the jury heard the defendant referred to as a "federal fugitive" but nevertheless sustained the conviction upon the theory that the other evidence of defendant's guilt was overwhelming. In United v. Gillette, 383 F.2d 843 (2d Cir. 1967) this Court sustained a conviction even though the jury learned there was a fingerprint card in being for the defendant. The Court referred to the fact in Gillette that all but handwriting exemplars had been excised from the card and the Court below had instructed the jury to disregard any reference to fingerprints. Both cases are clearly distinguishable from the case at bar for the following reasons:

1. With respect to Maxwell there is a vast difference between being a "fugitive" and being a "convicted perjurer" who has "been in jail"; the fact that a man is being

sought by the authorities is evidence of nothing, and he is not in the eyes of the jury a convicted criminal. Thus the jury's awareness of the fact is "unfortunate" but nevertheless tolerable within the meaning of due process of law.

2. With respect to Gillette, there is surely a vast difference in the eyes of a jury between a defendant who merely has a fingerprint card and a defendant who, as in the case at bar, is a convicted felon and who has been previously caged in a prison. The existence of a fingerprint card is again evidence of nothing; conviction and imprisonment have great meaning.

3. In sustaining Gillette this Court observed that any possible prejudice to defendant from the mere existence of a fingerprint card was minimized both by the excision therefrom of all but defendant's handwriting exemplar and the Court's instruction that the jury disregard any reference to fingerprints.

Here it was not merely stated that Mr. Rubinson was a fugitive or that he had a fingerprint card, but rather that he was a convicted felon who had been imprisoned -- an ex-convict! There was no instruction to the jury, and the Court specifically declined to give one because it would "highlight" the point (T.6709-10). We reckon the instruction was not given for the additional reason that no instruction could dispel or in any way alleviate the obviously overwhelming prejudice.

Surely the line defining acceptable prejudice or bearable impropriety must be drawn short of what was allowed to transpire here. If it is not, if Weitzman's statements are held to be "unfortunate" but acceptable within the meaning of Maxwell, then we respectfully state there is complete erosion of that principal which holds in substance that a defendant's prior criminal record must, absent certain narrow exceptions, be withheld from the jury which decides his guilt or innocence of the crime charged in the indictment. The Maxwell rationale, stated another way, seems to hold that when evidence of guilt appears to be overwhelming, due process of law is not violated merely by the jury's exposure to improperly prejudicial evidence. This we resepctfully state is harsh, and while we do not concede for a moment that the evidence of Mr. Rubinson's guilt is overwhelming, we do say that if it were, he would be all the more in need of strict due process and justice would demand that no improperly prejudicial evidence be permitted before the jury.

Should the Court permit by any rationalization a conviction to stand after a trial in which a witness has gratuitously made remarks the like of Weitzman's, then we respectfully say alarming potential for abuse comes into being. Witnesses can be primed by prosecutors, their agents, investigators or police officers to volunteer whatever they please at whatever moment they deem to be appropriate in cross-examination or, what is more likely, prosecutors who sense the potential for this kind of occurrence in a given situation may close their eyes to it and thereby, with

impunity, avoid the responsibility which we say is inherent in their office to, in the interest of justice, strongly caution their witness against such conduct. Further, defense attorneys will be hindered in the cross-examination of cooperating Government witnesses and other hostile witnesses by a real concern that should the witness become sufficiently shaken he may volunteer any kind of a gratuitous attack upon a defendant which under the Maxwell rationale will be held "unfortunate" but permissible. The law must be that in the event of a similar occurrence the prosecution must bear the responsibility and the prejudice of it, for only then will we be sure that the proseuction will take great care in preparing its witness to minimize the possibility of such an outrage occurring again in our courts.

The Court is respectfully referred to the fact that the Assistant United States Attorney in charge of the prosecution and the Court together, without consulting Mr. Rubinson, discussed the advisability of giving an instruction to the jury regarding the Weitzman statements (T. 6709-10) -- they obviously troubled the Government. The Court concluded in substance that it would be prejudicial to "highlight" the incident, and later, in its opinion, stated that defendants (presumably a typographical error) did not request that the Court admonish the jury to disregard the Weitzman remarks (2060a). This however is not so for during the trial, moments after the remarks were made, the following discussion in open Court took place between Mr. Rubinson,

acting without the aid of counsel, and the Court (498a):

> "MR. RUBINSON: Then I'd like a side bar conference or whatever you call it.
>
> THE COURT: Proceed with your cross-examination. I have denied your motion.
>
> MR. RUBINSON: I cannot proceed unless I speak to you in private about this, to explain to the jury about this case. (Emphasis added)
>
> THE COURT: No, we are not going to explain to the jury. You can't get a mistrial. (Emphasis added)
>
> MR. RUBINSON: I'm not looking for a mistrial. I'm looking to speak to you in private on the side bar * * * "

Rubinson was asking the Court to do something, " * * * to explain to the jury * * * ", but he was specifically told, "No, we are not going to explain to the jury." He was pro se, unprotected, and his request for an instruction was brushed aside -- catagorically denied. Appellant argues that the Court should have, sua sponte, instructed the jury to disregard the first remark the moment it was made and strongly admonish the witness against making any further gratuitous remarks, but instead the Court, in the presence of the jury, saw fit to seemingly imply that the entire incident was somehow contrived by Rubinson (499a).

We respectfully state that the Weitzman remarks were much too prejudicial to come within the rationale of Maxwell and Gillette, supra. However, even if the statement is deemed to be within those cases it is clear that their criteria has not been met principally because the Court failed to strongly admonish the

jury. Nevertheless as aforesaid, we respectfully state that no cautionary instruction would have been adequate in these circumstances.

It is respectfully asserted that the record simply does not support the Court's finding that the Weitzman remarks were responsive to Rubinson's line of questioning (2059a). With respect to the Court's alternative finding that the remarks were appropriate to impeach Rubinson's many "factual" statements to the jury that he, Rubinson, was a person of good character and most assuredly a credible person (2059a), we do not concede as a fact by any means that such statements were uttered but nevertheless ask this Court to consider that if indeed Rubinson made factual statements to the jury he was after all a pro se layman defendant. He did not want to conduct his own cross-examination or to speak in front of the jury; he asked for and was willing to accept a court appointed attorney to do this for him. It does not seem just to deny a man counsel and then use against him for any purpose his conduct in the courtroom. Most assuredly unwise and ill-advised conduct is predictable when a layman is thrust into these circumstances, Powell v. Alabama, 287 U.S. 45 supra.

In view of the foregoing it is respectfully asserted that the Court below erred in failing to declare a mistrial immediately upon the utterance of the subject prejudicial remarks and the Court further erred in failing to strenuously instruct the

jury to disregard the remarks. Defendant Rubinson was thereby denied a fair trial and due process of law. It is therefore respectfully requested that the judgment of conviction be reversed.

POINT III

THE COURT ERRED IN IMPOSING BLANKET TIME LIMITATIONS ON CROSS-EXAMINATION, RECROSS-EXAMINATION AND SUMMATION, AND IN LIMITING THE SCOPE OF RECROSS-EXAMINATION

Very early in the trial the Court imposed a blanket two-hour time limitation on the cross-examination to be conducted by each attorney and pro se defendant (311a, 368a)*. This restriction was ordered obviously before the Court could have possibly evaluated the complexity or importance of the testimony to be given by the many witnesses in this complicated and confused case.

Additionally, whenever a Government witness gave testimony allegedly relating only to one, or some, but not all defendants, attorneys for other defendants or pro se defendants to whom the testimony allegedly did not relate were prevented from conducting any cross-examination whatsoever (679a, 680a, 1196a).

The Court also saw fit to rule that any recross-examination of a witness was to be limited to fifteen minutes regardless of the length or content of a redirect-examination

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* At one point in the trial pro se defendant Chester, on his cross-examination of the witness Kaye, was limited to only one hour (1195a, 1196a). It is also noteworthy that Mr. Andrews, attorney for defendants Wax and Levine, was only allowed two hours even though he represented two defendants.

(1059a, 1067a)*. Defense counsel and pro se defendants were also prevented on recross-examination from asking questions on topics that were brought out on direct examination even though the Government, on redirect-examination, expanded or clarified those topics. Additionally, counsel and pro se defendants were not allowed to use their recross-examination time to complete cross-examinations which had been cut short because they had exhausted their time limitations (698a, 1059a-1063a, 1197a-1207a).

The fact that the Government was allowed to go back into an area on redirect that was gone into thoroughly on direct examination is not what is alleged as error. It is conceded that one of the purposes of redirect is for counsel to rebut any testimony that may have been brought out on cross. To make a blanket restriction on defense counsel however, preventing them from conducting effective recross-examination when damaging testimony is brought out on redirect-examination is prejudicial error, denial of due process of law and the right to confront witnesses. A fair trial cannot be accorded defendants under such sweeping restrictions.

Defense counsel were frustrated in their attempts to cross-examine many witnesses. Some witnesses, aware of the blanket time limitation, deliberately stalled, were

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* Prior to this point the Court imposed a half-hour limitation on recross-examination (376a).

evasive and argued with counsel so the time could not be used effectively. This practice was followed very cleverly by Sidney Stein for example, a professional witness if ever there was one and the cornerstone of the Government's case. Defense counsel and pro se defendants often had to sit and wait hoping that other counsel would go into an area that he did not have time to go into, and on occasion were criticized by the Court for having conferred among themselves because of this problem (1193a, 309a). Furthermore, defense counsel and pro se defendants were forced to take short cuts and mold their questions in such a way as to stay within the time limitations set by the Court.

It is respectfully submitted that the representation of a defendant and the role of a defense attorney at trial is in the truest sense of the word an art to be preserved and encouraged in our criminal justice system. A defense attorney's mission as we see it, to deliver the most forceful, ethical representation possible, is of the most noble stature and must not be diminished if we are to continue as a free nation. Thus the law must not permit competent counsel who seek only to employ all of their skill in the total defense of their client to be hamstrung at the outset of a trial by limitations such as those laid down at the very outset of this case. These limitations infiltrated every decision, severely constricted the defense strategy, and crippled preparation and delivery of cross-examination and summation.

It is recognized that the Court is vested with wide discretion in conducting the trial. The law is well-settled that the Court may control the length and scope of cross-examination. Alford v. United States, 282 U.S. 687 (1931); Michelson v. United States, 335 U.S. 469 (1948); Smith v. Illinois, 390 U.S 129 (1968). This discretion is properly given to a trial judge in order to obviate unnecessarily long proceedings and to prevent attorneys from going into areas not relevant to the issues at hand. United States v. Kahn, 472 F.2d 272 (2nd Cir., 1973) cert. denied, 411 U.S. 982 (1973). This Court observed for example (at page 281):

> "It is a basic principle that a trial judge has extensive discretion in controlling the scope and length of cross-examination."

Although a trial judge is vested with wide discretion, it is submitted that broad limitations on cross-examination such as those imposed by the Court below on each attorney with respect to each witness without first hearing the direct examination, observing the tempo, scope and effectiveness of initial cross-examination and how effectively the witness has been or is being examined by other defense counsel, was prejudicial, an abuse of discretion, and a clear denial of the Sixth Amendment right to confrontation. Such a blanket restriction prejudicially limits the right of cross-examination. United States.v. Jorgenson, 451 F.2d 516, 519, 520 (10th Cir. 1972), cert. denied, 405 U.S.

922 (1972); United States v. Jackson, 482 F.2d 1167, (10th Cir. 1973), cert. denied, 414 U.S. 1159 (1974).

Defense counsel should be given considerable leeway in conducting cross-examination. United States v. Birnbaum, 337 F.2d 490 (2nd Cir. 1964). This is necessary to insure fundamental fairness and to prevent prejudice. Defendants herein were not given that basic right. On one occasion defendant Chester's time on cross-examination was limited to one hour (1194a-1196a).

In Alford v. United States, supra, the Supreme Court said (at p. 692):

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them... To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . .In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony."(Emphasis added)

A thorough review of the cases in this Circuit and others fails to reveal any instance where a trial court fixed, near the outset of trial, a two-hour limitation for all

further cross-examination. In United States v. Armone, 363 F.2d 385 (2nd Cir. 1966), Cert. denied, 385 U.S. 957 (1966), the Court set for cross-examination a five and one-half days limitation on one attorney who represented two of the defendants.

In United States v. Crosby, 294 F.2d 928 (2nd Cir. 1961), a securities fraud case involving eight individual defendants and one corporate defendant, this Court held that the trial Court was within its discretion in stopping one attorney's summation after five and one-half hours (p.944) when he had requested only five hours. In the instant case at the conclusion of a nine week trial, attorneys were simply directed to complete their summation within two hours, and the limitation was strictly adhered to (1547a).

Judge Motley, commenting on the restrictions imposed at this trial, observed (375a):

> THE COURT: I have been over this. I have had cases like this before. I imposed limits on trial lawyers, and those cases have been up in the Court of Appeals.
>
> * * * * *
>
> THE COURT: In one instance I sought to limit lawyers, and I limited them to two hours, and the Government suggested maybe I ought not to do so, and one lawyer went on for eighteen hours, eighteen hours. (Emphasis added)

Surely this kind of abuse can be effectively dealt with by the Court as it occurs, but it would appear that even the Government disagreed with the practice of limitation on

the mere anticipation of abuse. Surely this Court we think did not mean its approval in previous cases of limited restrictions upon specific cross-examination to be the imprimatur for the blanket limitation fixed in this case.

If a trial judge is allowed to impose a two-hour limitation on cross-examination on the ground that there are eight defendants, does this mean that another judge can limit cross-examination to one hour for the same reason or to a half-hour if there are twelve defendants? If this were allowed, it would be advantageous for the Government to seek indictments involving multiple defendants. Such a practice is prejudicial and a denial of a defendant's Constitutional rights to counsel and to confront the witnesses against him. The trial court's discretion, as noted in Kahn, supra, should not extend to the point where these rights are seriously infringed as they were in this case.

Kahn pointed out that the principle that a trial judge has discretion in limiting scope and length of cross-examination would "seem to apply with special force to re-cross, especially after a full and searching cross-examination." (at page 281). Here "full and searching" cross-examination of important witnesses was impossible. Defense counsel and pro se defendants were forced to cut corners in order to be sure they covered even basic areas during cross-examination. Even though a trial court is vested with great discretion, this Court in Kahn, supra, went on to say (at page 282):

> "* * * [T]he trial court's power to limit cross-examination is often best exercised after hearing the direct testimony of the witnesses." (Emphasis added.)

In the case at bar, key witnesses often testified on direct examination for a full day, and more. Furthermore, the Government had the advantage of having had many years to prepare for this trial and of having all documents and records from the civil trial in which key facts were fully developed. Defense counsel, on the other hand, did not even learn who the witnesses were to be until the night before they testified and often only then received the massive amounts of 3500 material associated with the witness. If no 3500 material existed, counsel did not even know who the witness would be until he or she assumed the stand -- a good example of this was the SEC expert Ingrid Nelson. The defense had been led to expect that one Thomas Fox, who had testified for the Government as an SEC expert to the extent of 750 pages at the civil trial of Stern-Haskell, would be called at this trial. He had been seen in and around the courtroom and the United States Attorney's office on numerous occasions during the two-week period immediately preceding the time when his testimony would logically have been called for, and the defense was ready for him with a blistering cross-examination (1257a-1259a). Instead, the defense was confronted by Ms. Nelson--a complete stranger to the case. Furthermore, defense counsel and pro se defendants were summarily cut off

by the Court at the end of their respective two hours of cross-examination (948a, 1284a, 1285a).

Under all these circumstances, a trial may become little more than a mere condition precedent to conviction, a bothersome charade which the Government must act out before it can clap a man into prison, and cannot be considered fair in any sense of the word.

The Court's 15-minute limitation on recross-examination similarly prejudiced defendants. This and the restriction of recross-examination to distinctly new areas brought out on redirect was clear prejudicial error. United States v. Morris, 485 F.2d 1385 (5th Cir. 1973); United States v. Dana, 457 F.2d 205 (7th Cir. 1972). The extreme danger of this practice, enforced without variance once established, was highlighted when Judge Mortley refused to allow cross-examination of Mark White by any of the defendants after he made an astounding, and extremely damaging remark at the close of the Government's redirect examination (698a).

POINT IV

APPELLANT RUBINSON WAS OVERWHELMINGLY PREJUDICED AND DENIED A FAIR TRIAL BY VIRTUE OF IMPROPER STATEMENTS MADE BY THE GOVERNMENT IN ITS REBUTTAL SUMMATION

The Court is respectfully referred to Point I, brief of Appellant Lawrence Levine, for the background of the Government's prejudicial remarks on rebuttal summation regarding Allen Electronics, David Auld, Calculator Computer Leasing and General Auto Parts.

Throughout the trial, during the direct and redirect examination of certain Government witnesses, the jury heard much testimony which established a connection between Norman Rubinson and certain companies, namely, among others, Allen Electronics Corporation, Calculator Computor Leasing Corporation, David Auld and General Auto Parts (Allen Electronics: T. 269-271, T. 282, T. 286, T. 287, T. 555, T. 578, T. 703, T. 726, 562a; Calculator Computor Leasing: T. 690, 277a, T. 1449, T. 1450; Allen, Calculator, David Auld, General Auto: 1049a-1056a). Moreover, in its bill of particulars the Government indicated that it intended to introduce evidence at trial regarding these companies and others as prior similar acts against Mr. Rubinson (32a).

Rubinson on the other hand tried to contend,

through the offer of documents and cross-examination of certain witnesses, that inasmuch as these companies had openly become public through the spin-off method the inference should be drawn that prior to the SEC July 19, 1969 release on the subject (1921a) when the transactions took place he believed the practice of spin-offs was lawful (1054a).

Rubinson was repeatedly precluded from inquiring into these transactions because once the trial began the Government took the position that it did not contend, and did not intend to offer proof, that the Allen Electronics, Calculator Computor Leasing, David Auld or General Auto Parts transactions were illegal, and Rubinson therefore should not be permitted to ask questions about them (593a, 595a, 599a; T. 5259, 5262, 5263). The Government observed that these companies and Mr. Rubinson's transactions with them had, "nothing to do with this case" (T. 5263). The Court sustained the Government uniformly in this position.

Thus, the Government was permitted to put in proof with respect to National Ventures, Mobile Home Ventures and Diston Industries as alleged prior similar criminal acts, but Mr. Rubinson, whose relationship to these transactions was nil, was not permitted to show his bona fides through proof relating to Calculator Computor Leasing, General Auto, David Auld

and Allen Electronics. The Court is respectfully advised that prior similar act evidence with respect to National Ventures, Mobile Homes and Diston Industries absorbed several weeks of trial time.

The Government, having thus effectively barred all inquiry by Mr. Rubinson into Allen Electronics, Calculator Computor Leasing, David Auld and General Auto Parts during trial by repeatedly saying they had nothing to do with the case, suddenly and without warning expressly branded the very same companies "frauds" (1590a) and "manipulated stocks" (1591a) during its rebuttal summation. The Government went on to tell the jury that it did not "particularly want to foc on these stocks during the trial because it wanted the jury to focus on Stern-Haskell, and that proof of these frauds and manipulations was not left out by the Government because "it isn't there" (1591a). If the Government was going to brand these companies frauds and manipulations during its rebuttal summation, all of them having been closely associated with Rubinson during trial, why then did it foreclose Rubinson from questioning about them? Why did it take the position that "those companies are not relevant to this case" (594a), and why did it permit the Court to observe, in ruling that Rubinson could not inquire on these companies, that "the Government has not offered to prove any illegality with respect to, and so you can't go into that [Calculator

Computor Leasing, Allen Electronics, David Auld and General Auto Parts] because the Government is not offering to prove any illegal activities with respect to those matters, so you can't go into it." (595a)?

The Government steadfastly held to this position and foreclosed Rubinson's questioning on these stocks every time he tried to do it. For example, when Rubinson tried to cross-examine one Gerald Teitlebaum, C.P.A., accountant for Allen Electronics and President of Calculator Computor Leasing, about these companies the Government observed: "it has nothing to do with this case." (T. 5263). Again, when he tried to examine the witness Mark White (a well-known Washington attorney and securities law expert who had given opinion letters in 1968 regarding Allen Electronics) about consultations he had given Rubinson on Allen Electronics, the Government objected saying, "we have been into this Allen Electronics thing before." he objection was sustained and Rubinson was effectively blocked from any inquiry whatsoever into his activities with the company (T. 3070).

In sum then the Government manuevered itself into the enviable position of, so to speak, having its cake and eating it too. It barred Rubinson from any reference to his activities in these four companies -- which he desperately wanted to show the jury -- by telling the Court that the activities were not illegal and therefore had nothing to do

with the case even though Rubinson claimed and wanted to show the jury that they bore heavily upon his state of mind and bona fides. Nobody even considered that Rubinson might have the independent right to show these earlier spin-offs regardless of the Government's position as to their legality. Later, after all opportunities had passed for Rubinson to examine the witnesses he knew might have given testimony regarding the companies, the Government completely changed its position and branded the companies frauds and manipulations. Apparently recognizing the terrible impropriety and injustice caused by the remarks on rebuttal summation, the Government requested the Court to give an additional instruction to the jury (1913a, 1914a). Norman Rubinson joined in the request. The instruction was never given. The unfairness of what was done here is self-evident that the Court permitted the Government, with impunity, to take such mutually inconsistent positions with respect to the same subject to enhance its case and prejudice a defendant on trial without a lawyer to protect him is an outrage. We respectfully state that at the very least the Court, having told Rubinson time and again that he could not cross-examine on the subject because the Government was not alleging illegality, should have declared a mistrial the moment it heard the same subject matter branded fraudulent by the Government. On the contrary, there was no mistrial and the Court did not even read the instruction which, it was hoped by all including the Government, might alleviate the prejudice.

POINT V

APPELLANT LACKED REQUISITE CRIMINAL INTENT TO WARRANT CONVICTION OF VIOLATION OF THE REGISTRATION PROVISIONS OF THE SECURITIES ACT OF 1933

The Court is respectfully referred to the Statement of the Evidence beginning at page 8, supra, for a description of the method by which the Stern-Haskell spin-off was accomplished.

The evidence made it abundantly clear that such spin-offs were a common practice in 1969 at the time the Stern-Haskell spin-off was done (G.X. 121c, 1921a, 1286a, 1287a). See also Securities and Exchange Commission v. Harwyn Industries Corp., 326 Fed. Sup. 943 (D.C. S.D.N.Y., 1971); Securities and Exchange Commission v. Datronics Engineers Corp., 490 F.2d 250 (4th Cir. 1973), cert. denied, 416 U.S. 937 (1974); Securities and Exhcange Commission v. LesStud Corp. 1970, 71 CCH Fed. Sec. L. Rep. ¶92866 (D.C. S.D.N.Y., 1970)

Defendant Rubinson had spun off other companies openly in the past, with advice of counsel, which spin-offs he tried repeatedly but unsuccessfully throughout the trial to acquaint the jury with. He had numerous exhibits to show his bona fides but they were ignored (2068a-2115a). Likewise, defendant Chester was completely open in his spin-off dealings.

The SEC release of July 2, 1969 which addressed the subject (1921a) said merely that the practice "may be" a violation, and this release was issued after the Stern-Ha[illegible]ll spin-off was completed. Also the Harwyn case, supra, which was the first case to hold the practice violative of the securities laws registration requirements, was not decided until after Stern-Haskell was history. Indeed the Court in Harwyn declined to grant the SEC's motion for preliminary injunction (p. 956, 957), and took cognizance of the need for guidance in the area (p. 958):

> "Accordingly, although we have expressed our opinion as to the necessity for registration of Harwyn-type spin-offs in order to furnish guidance to the parties and others contemplating similar transactions (Emphasis added)

Like Harwyn, supra, there was a civil trial regarding Stern-Haskell, Securities and Exchange Commission v. Stern Haskell, Inc., Dkt. #70 Civ. 4065 (D.C. S.D.N.Y., 1970), but the Government went further and obtained an indictment against these defendants. We respectfully state however, that in light of the foregoing criminal intent to violate the registration provisicns of the securities laws was not proven beyond reasonable doubt.

POINT VI

THE UNAUTHORIZED COMMUNICATION BETWEEN DEFENDANT HASKELL AND A JUROR WAS PREJUDICIAL TO APPELLANT RUBINSON DENYING HIM A FAIR TRIAL.

Defendant Haskell's communication with a juror during the course of the trial with respect to the loss of $200,000.00 by Haskell because of the Stern-Haskell deal and the fact that everyone else made money was especially prejudicial to defendant Rubinson. The entire theme of the trial revolved around the Government's allegation that Rubinson was a major factor, along with Sidney Stein, in the Stern-Haskell spin-off and manipulation. The conversation between Haskell and the juror tended to corroborate the theory postulated by the Government in that the Government's opening statement and the testimony of witnesses -- both prior and subsequent to the questioned communication between Haskell and the juror -- made several vague innuendoes regarding profits that were allegedly made by Rubinson from the Stern-Haskell transaction. Mr. Wohl also advised the jury several times that in determining guilt it should "follow the money" -- keep its "eye on the money" (210a).

When the matter of Haskell's communication with the juror was brought to the Court's attention (995a), the Government felt that it may be a problem, pointing out:

> "* * *It [referring to Haskell's conversation with the juror] is a largely exculpatory story that he has given to this juror of himself. To some extent it is an inculpatory story, I suppose, as to other defendants, because my recollection is that he said something to the effect that everybody else made money." (1002a)

The prosecutor further observed:

> "I think that several of the defendants here are probably going to take the position impliedly or explicitly that they did not necessarily profit from this series of transactions, and so there is an additional problem." (1005a)

Mr. Rubinson, pro se, was the only person in the robing room who did not address the Court with respect to the turn of events nor was his position elicited. He did not consent to the juror continuing to serve.

The Court attempted to ameliorate the problem by instructing the juror that the Haskell statements "[were] intended to evoke sympathy" from her (1013a). Nothing was said to the juror, nor was Rubinson advised, as to the prejudicial aspects of the conversation and the effect said conversation had on each co-defendant. It is submitted that this brief instruction by the Court was not enough to neutralize the prejudicial impact of such a damaging statement. The overwhelmingly prejudicial aspects of this conversation and the fact that defendant Rubinson was unaware of its consequences because he was not represented by counsel, demands a new trial for Rubinson.

Any communication between a juror and a third party about the proceedings in which the juror is sitting when the juror was instructed by the Court not to discuss the case with anyone is presumptively prejudicial and grounds for a new trial. Remmer v. United States, 347 U.S. 227 (1954). In that case the Supreme Court said (at page 229):

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rest heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."

The law in this District is also clear on the subject. In United States v. Fay, 238 F. Supp. 1005 (S.D.N.Y. 1965), the Court said (at page 1007):

> "There can be no doubt that the juror's communication with the third party violated the Court's express instruction, * * * However, not every violation by a juror of the Court's instructions with respect to third party communications, nor every irregularity in a juror's conduct, automatically compels the declaration of a mistrial, the replacement of a juror, or the vacatur of a judgment of conviction. The dereliction must be such that it may be said to deprive the parties of the continued objective and disinterested judgment of the juror, thereby foreclosing a fundamentally fair trial."

Although the cases cited deal with a juror communicating with a third party, not a defendant, it is submitted that the problem here is further exacerbated by the fact that a co-defendant made a statement, absolving himself but implicating co-defendants, to the jury foreperson. It may be argued that the juror stated that she could still, in fact, judge the case impartially. Common sense, however, would dictate that a statement, made by a fringe defendant would leave an impact on a juror, especially when the statement corroborates the Government's theory of the case. Of course, we can only speculate as to the extent of the impact of this conversation upon the juror's thinking and the verdict, but due process dictates that any such question should be resolved in favor of Mr. Rubinson.

POINT VII

APPELLANT RUBINSON RESPECTFULLY ADOPTS THE ARGUMENTS OF APPELLANT LEVINE REGARDING THE EXISTENCE OF MULTIPLE CONSPIRACIES AS OPPOSED TO A SINGLE CONSPRACY, AND PREJUDICIAL PRE-TRIAL DELAY COUPLED WITH PARALLEL CIVIL PROCEEDINGS

CONCLUSION

The judgment below should be reversed and the case remanded with instructions to dismiss the indictment; in the alternative, the case should be remanded for a new trial.

Respectfully submitted,

SHEA GOULD CLIMENKO KRAMER & CASEY
Attorneys for Defendant-Appellant
Norman Rubinson
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Thomas A. Andrews
John J. Grimes

Of Counsel.